



# Best Interests and Deprivation of Liberty

Case law update - June 2010

## Best Interests Determinations and Deprivation of Liberty

**Three recent court decisions provide illustrations of the balancing exercise which the courts undertake, and will expect the NHS and local authorities to have undertaken, when considering whether an action is in the best interests of an individual who lacks capacity under the Mental Capacity Act 2005 to make that decision.**

**Two of the cases also involved consideration of the interface between human rights legislation and the Mental Capacity Act, in particular in relation to Deprivation of Liberty.**

The first of these cases, **Dorset County Council v EH (2009)**, was a decision of the Family Division of the High Court. It concerned an 82 year old woman (EH) suffering from Alzheimer's dementia. She lacked capacity to make decisions in respect of her health and welfare. Her condition meant that she had an impaired appreciation of risk which caused her to leave her home, wander and become lost and left her unable to recognise fire hazards, manage her medication or feed herself adequately. The Council had sought, for two years, to provide assistance to EH in her own home, but she was very resistant to this and it had been of very limited benefit. It was also recognised that EH would be opposed to a move to residential home and that this would be a matter of considerable distress.

An application was brought by the Council because it was concerned that EH's condition had deteriorated to the point where she could not be safely left in her own home. The Council maintained that it would be in her best interests to be transferred to secure residential accommodation. In addition, as EH was likely to be resistant to any attempts to move her, the Council

sought declarations from the court that it would be lawful for reasonable and proportionate force to be used to transport EH to the chosen accommodation and to prevent her from leaving. The Council had the support of EH's family in making the application as they were no longer able to provide EH with the support in the community that she required.

The application was opposed by the Official Solicitor acting on EH's behalf. The Official Solicitor was particularly concerned about the potential deprivation of EH's liberty and wished to explore whether there were options which were less restrictive of EH's rights and freedom than moving her to a secure care home. The Official Solicitor sought advice from a Consultant in the Psychiatry of Old Age. He was of the view that it was not in EH's best interests to move at present, although he acknowledged that it was inevitable that EH would have to go into residential care in the future. He considered that there would be a significant worsening of the quality of EH's life if moved to a secure residential home. The Official Solicitor did not consider that the risks to EH were sufficient to justify depriving EH of her liberty. The Official Solicitor also disputed whether the residential home recommend by the Council was suitable.

In considering the application, the Judge heard from the Consultant and the team manager for social services, as well as considering a capacity assessment, a letter from the family, expert reports, statements and the prospectus for the care home. The Judge noted that consideration had been given as how to introduce and acclimatise EH to the residential home, including contingency plans for the use of force or sedation. The Judge also noted that the Consultant retained by the Official Solicitor had considered options for supporting EH in her own home, however, the Judge considered these to be ineffective or inappropriate.



In reaching her decision, the Judge carried out a careful analysis of the Mental Capacity Act 2005. Having reached the conclusion that EH did not have capacity, the Judge reminded herself of the factors to be considered when undertaking a best interests determination as set out in sections 4 and 7 of the Mental Capacity Act 2005. This included EH's past and present wishes and feelings, any beliefs and values which might influence EH's decision if she had capacity, any other facts which she might have been likely to consider and the views of others. The Judge noted that there was no direct evidence of EH's past wishes and that EH's present beliefs were not based on reality.

The Judge also reviewed whether a deprivation of liberty was likely to occur and in doing so had regard to Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in conjunction with the Mental Capacity Act 2005 and recent case law. The Judge concluded that residence at the chosen home would involve deprivation of EH's liberty within the meaning of Article 5.

Counsel for the parties were asked to provide submissions on the 'pros and cons' of each option. In her Judgement, the Judge undertook a balancing exercise to determine best interests, setting out a table of the risks presented by EH staying or moving against the benefits of staying or moving. This exercise indicated that the only factors against an immediate move to residential accommodation were the limitation on autonomy and the risk of EH developing depression. The Judge commented that 'autonomy is of course an important principle but in my view it does not trump welfare'. The Judge did not consider, in any event, that EH had true independence any longer and was mindful of the fact that, in the event of a further deterioration in EH's condition, there would be a greater risk of adverse psychological reaction stemming from an emergency and unplanned move. On balance, the Judge concluded that it was in EH's best interests to move at that time and for her to be placed in a secure care home.

The Court of Protection case, **G v E and Others (2010)**, considered E, who had severe learning disabilities and at the time of the decision was 19 years old. E had been cared for by F since he was 5 years old and attended a school for those with special needs. The School expressed concerns as to the care being provided by F, although other professionals spoke highly of F. There were also concerns about F's ability to manage E's sometimes challenging behaviour. However, F applied to continue to be E's carer when he reached the age of 18 and an adult placement agreement was signed. In early 2009, reports were

received by the local authority that E had made comments which suggested inappropriate treatment by F. E was placed in respite care whilst the matter was investigated. A series of meetings were held, to which F was not invited. The decision was taken to move E to another home, where he purportedly signed a tenancy agreement. Reports suggested that E was doing well at the new home. The court was informed that staff at the home exercised complete control over E's care, movements, treatment, contacts and residence.

E's sister, G, applied to the Court for declarations as to whether E had capacity, whether it was in E's best interests to return to live with F or whether he should be cared for in a residential home, whether E had been unlawfully detained in breach of Article 5 and/or the Deprivation of Liberty Safeguards set out under the Mental Capacity Act 2005 and whether the local authority had interfered with E's right to a home and family life until Article 8 of the Convention. The judgement obtained was in fact an interim judgement pending a final decision in July 2010.

In this case, the Judge also reminded himself of the need to have section 4 of the Mental Capacity Act firmly in mind when considering best interests. The Judge also thoroughly reviewed the Deprivation of Liberty Safeguards requirements. The Judge then went on to consider the matters in issue before him in stages. He concluded that E did lack capacity to make decisions as to his care and treatment regime. His placement at the current residential home 'undoubtedly' deprived E of his liberty, with the Judge noting that the 'key factor is whether the person is, or is not, free to leave'.

Having reached that conclusion, the Judge asked himself whether that deprivation was a breach of Article 5. The removal of E was an arbitrary act and there had been no attempt to follow the urgent and standard authorisations procedures under the Deprivation of Liberty Safeguards which had been introduced a few days before E's removal. In the absence of any authorisation or court order under the Mental Capacity Act, E had been unlawfully deprived of his liberty by being placed in first one, and then another, residential home. The Judge was critical of the local authority's failure to recognise that it needed to follow these procedures or acknowledge that it had failed to do so.



There was found to be no evidence of any balancing exercise undertaken by the local authority in respect of the positives and negatives of E's removal and the impact on his family life. A best interests determination should have been undertaken prior to the removal, which should have taken into account the close relationship between E and F and the need to sustain that relationship. Long term foster carers such as F were clearly within the ambit of Article 8. This failure to undertake a balancing exercise, coupled with the failure to involve F in the decision to remove E led the court to conclude that there was a breach of E's Article 8 rights.

The Judge undertook a very detailed analysis of the various factors to be weighed when considered E's best interests. He considered that E could only enjoy the benefits of family life with F and that F's care of E had generally been of high quality. To be balanced against this, was the fact that E had made improvements, particularly in relation to communication and independence skills, since E had been placed at the residential home, and that he had improved at school. Further, the Judge had to consider the effect on E of any return to F, having been at the home for some time, and the further effect of any later removal following the planned final hearing.

The Judge was assisted by a best interests balance sheet prepared by the Official Solicitor. The Judge went on in his judgement to list all of the benefits of E returning to F at this stage against the disadvantages. Having performed this exercise, the Judge concluded that it was in E's best interests to remain in the home until the final hearing. On reaching this conclusion, a significant factor was the Judge's concerns about the effect that a return to F's care might have on E, when this might only be temporary. In advance of the final hearing, the local authority was ordered to arrange a comprehensive risk assessment of the proposed placement.

**In DH NHS Foundation Trust v PS (by her litigation friend, the Official Solicitor) 2010** Sir Nicholas Wall, the President of the Family Division of the High Court, was required to consider whether it was in the best interests of PS to undergo surgery for cancer of the uterus. It was agreed that PS lacked capacity to make decisions about her medical treatment. Without surgery, the cancer would inevitably spread and cause PS' death.

PS had previously agreed to undergo surgery, but had failed, and on occasion, refused to attend hospital for treatment. The clinicians had concluded that there were no viable alternatives to surgery and therefore steps needed to be taken to ensure that PS had the

surgery and then remained in hospital to allow her to recover. The NHS Trust proposed that, in the event of a further refusal to come to hospital, PS be administered a sedative to allow her to be transferred from her home. Post surgery, it was intended that PS be kept sedated to prevent her from leaving, although the NHS Trust acknowledged that it might be necessary to use force as a last resort.

Having heard and read evidence from various clinicians and a learning disabilities community sister, the Judge was satisfied that, although the application was 'unusual', it was in the best interests for PS to undergo surgery and, further, that the use of sedation and/or force, if required to facilitate that surgery, would also be in PS' best interests. The Judge considered that it was not necessary to invoke the Deprivation of Liberty Safeguards for PS' stay in hospital post surgery, as if it was in PS' best interests to have surgery, it was clearly in her best interests to recover from it. However, the judgement does not indicate that consideration was given to whether the patient's stay post surgery may result in steps being taken or proposed to be taken which might amount to a deprivation of liberty.

### Comment

The courts have clearly demonstrated the detailed analysis and balancing exercise which they undertake before making any best interests decision as well as the interface with the Human Rights Act 1998.

In particular, the case of PS demonstrates that the courts are prepared to make and support bold decisions, if the evidence can be provided to demonstrate that an action is in an individual's best interests. The cases are also a reminder of the need to consider and, if necessary, implement the processes under the Deprivation of Liberty Safeguards. Practitioners in the field need to be aware that the courts will take a wider 'rights based' approach and should include ensure that that the Human Rights Act 1998 also informs their decision making.

In order to be in the best possible position to avoid challenge, those determining best interests under the Mental Capacity Act 2005 and Best Interests Assessors on behalf of Supervisory Bodies should follow the requirements of the Mental Capacity Act 2005, the Mental Capacity Act 2005 Code of Practice and the Deprivation of Liberty Safeguards supplementary Code of Practice when making best interests decisions, with each step and consideration being fully documented.



## More information

Morgan Cole can provide advice on all aspects of human rights, Mental Capacity Act law including the Deprivation of Liberty Safeguarding Process. For further information please contact a member of the Morgan Cole Mental Capacity Act team:



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